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No. 86-1548

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION

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REPLY BRIEF OF NORTHWEST AIRLINES, INC. IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

Petitioner Northwest Airlines, Inc. submits this reply brief in support of its petition for a writ of certiorari.

1. Respondent Air Line Pilots Association ("ALPA") has buried in the back of its brief its argument about the relationship of this case to *Misco, Inc. v. United Paperworkers International Union*, No. 86-651. Opp. at 19-21. ALPA's ostrich-like behavior, however, cannot hide the fact that the issue in this case is identical to that in *Misco*. Indeed, ALPA does not dispute that. Nor does ALPA dispute that this case presents the "other side" of the circuit conflict that prompted the grant of the writ in *Misco*, in a context uncluttered by procedural and factual complications. *See* Pet. at 9-10.

Instead, ALPA simply tries to distinguish *Misco* from this case *on the merits*. That is beside the point. We do not doubt that the two cases are factually different and may be legally distinguishable. Contrary to ALPA's contention, however, that

difference is exactly why this Court should hear the cases *in tandem*. By considering together two cases at the extremes of the circuit conflict—the most expansive (*Misco*) and the most restrictive (this case) of the circuit positions on the "public policy" exception—this Court can better define the proper scope of the public policy doctrine.

2. In addition, ALPA's attempt to distinguish *Misco* fails. ALPA claims that *Misco* implicated a cognizable "public policy" because the court there lacked "assurances" that the discharged employee would never again engage in safety-related misconduct, whereas in this case "public policy" is not threatened because such "assurances" exist. Those "assurances," according to ALPA, are the facts that (unlike *Misco*, ALPA asserts) the arbitrator in this case purportedly considered the safety issues and a government agency decided that reinstatement was consistent with the public interest. ALPA is wrong on both counts.

ALPA's first distinction—the claim that the arbitrator here carefully considered public safety—simply begs the question. The very issue to be decided is whether a labor arbitrator is authorized to reverse an air carrier's safety determination. As *amici curiae* Air Transport Association and Airline Industrial Relations Conference have pointed out, airlines and unions have never included safety-related rules on drinking in their collective bargaining agreements, nor have they considered such rules the proper subject for reexamination by grievance arbitrators. For these reasons, the entire airline industry views the decision below as interferring with air carriers' ability to carry out their statutory safety obligations concerning drinking by pilots, and as muddying the waters concerning the enforceability of carriers' alcohol policies. *See* ATA/Air Conf. Br. at 11-13.

ALPA's second distinction—the insinuation that FAA recertification cures the problem—is also wrong. The FAA's action in this case does not even address the public policy at issue here, which is whether an airline is entitled to have a policy that makes flying an airplane while under the influence of liquor "just cause" for dismissal, regardless of any medical

treatment the pilot may *later* obtain. Moreover, the FAA's recertification of Morrison does not offer much assurance even about the pilot's reliability in the future. The FAA has been willing to recertify alcoholic pilots despite a relapse rate of 10-25%—and to re-recertify *relapsed* alcoholic pilots despite a re-relapse rate of 50% of more.[1] This pattern shows that the FAA's involvement hardly offers much reassurance.

Blind reliance on the FAA is not the answer here. Indeed, ALPA's argument that safety could not possibly be compromised because the FAA recertified Morrison is particularly ironic in light of ALPA's recent, appropriate—and successful—efforts to force the resignation of the Federal Air Surgeon who recertified Morrison in early 1986. ALPA accurately and candidly accused the former Federal Air Surgeon of "approving scores of pilots for service despite doubts about their fitness." *See* "Aviation Agency Medical Chief Is Asked To Resign," *New York Times,* Nov. 23, 1986, at 28, col.1.

Furthermore, it would be grossly unfair to hoist Northwest on the petard of the FAA recertification orders. Even before it sued to overturn the arbitration award in this case, Northwest petitioned the court of appeals for review of the FAA recertification orders. Northwest argued that the orders and the underlying FAA policies on alcohol abuse are themselves contrary to the Aviation Act and to the FAA's own regulations. In a decision handed down a few months before the decision in this case, the court of appeals recognized that "serious questions" exist about the lawfulness of the FAA's alcoholism policies and about its recertification of Morrison as minimally qualified to fly. *Northwest Airlines, Inc. v. FAA (Morrison)*, 795 F.2d 195, 197 (D.C. Cir. 1986). In an earlier case, the court had expressed similar doubts about the recertification of another alcoholic pilot. *Northwest Airlines, Inc. v. FAA (McClellan)*, 675 F.2d 1303, 1306 (D.C. Cir. 1982). In the

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[1] *See* Northwest Conditional Statement Of Alleged Material Facts As To Which There Is A Genuine Issue And Conditional Request For Discovery, *Northwest Airlines, Inc. v. ALPA,* Civil Action No. 84-3434 (D.D.C.) ("Conditional Statement"), at 14-15; Brief of Petitioner, *Northwest Airlines, Inc. v. FAA*, No. 84-1510 (D.C. Cir.), at 37-43.

FAA (Morrison) case, the court held that Northwest "lacked standing" to challenge Morrison's recertification by the FAA because the district court in *this* case *had overturned* the System Board award. 795 F.2d at 205. A separate panel below now has reversed the district court's decision and reinstated the System Board award, relying on the very FAA certification that the earlier panel had found questionable. Such apparently cavalier treatment of a serious threat to public safety is another reason why this Court should review the case.[2]

Finally, ALPA's attempt to distinguish *Misco* rests on the false premise that the risk of Morrison's relapse in the future was the only basis for his discharge, and was the district court's only basis for denying his reinstatement. That risk is real, since the record establishes that a rule-breaking alcoholic is more likely to revert to rule-breaking behavior if he relapses than is an alcoholic who, unlike Morrison, comes forward to seek treatment before he flies while intoxicated.[3] But risk of relapse was not the sole reason for Northwest's decision to discharge him or the district court's reason for upholding that action. The discharge represented Northwest's attempt to enforce valid, "reasonable and rational" alcohol policies and to deter such gross misconduct *by others*. Pet. App. B at 40a-41a. The district court also recognized that Northwest determined, in the exercise of its duty under the Federal Aviation Act and regulations, that a pilot who engages in such conduct lacks the necessary character and judgment to be entrusted with the lives of thousands of travellers. Pet. App. B at 35a, 46a-47a. The FAA's decision that, as a matter of minimal medical qualification, Morrison's risk of relapse is "only" 10-25% and thus may be acceptable to the agency simply does not speak to these other legitimate public policy concerns.

3. ALPA does not really address the need for this Court to consider whether the court of appeals took an overly narrow view of *W.R. Grace and Co. v. Local 759, International Union*

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[2] The court in the earlier *McClellan* case found that the alcoholic pilot's voluntary retirement had "mooted" Northwest's challenge to the FAA's alcoholism recertification policies.

[3] *See* Northwest Conditional Statement, at 19-20 and Exhs. B & C.

of United Rubber Workers, 461 U.S. 757 (1983). *See* Pet. at 10-18. Rather, ALPA principally argues that the FAA's role in the present case precludes a court from finding that the arbitral award comprises public policy. ALPA concedes that "there is a 'well defined and dominant' public policy based on safety considerations that pilots should not fly when intoxicated." Opp. at 15. ALPA argues, however, that the policy cannot be compromised by the arbitration award because the FAA issued airman and medical certificates to Morrison. *Id.*

The Federal Aviation Act, however, mandates *both* that the FAA set minimum standards for airmen *and* that air carriers act to maintain the *highest degree* of safety—an independent obligation that ALPA conveniently ignores. As we pointed out in the petition (at 16-17), both the arbitrator and the court of appeals here ignored this independent statutory duty imposed on carriers to go beyond the minimum standards promulgated by the FAA when they deem it necessary to achieve the highest possible degree of safety. *See also* ATA/Air Conf. Br. at 3-5, 11-12. Contrary to ALPA's assertion, therefore, the FAA's decision does not foreclose further inquiry into whether the arbitrator's award impermissably frustrates the public policy in allowing airlines to take effective steps to deter and punish drinking and flying.

ALPA again displays its fundamental misunderstanding of the statutory scheme. While the FAA is required to establish minimum standards, the FAA bears no liability for its errors in certifying pilots. *See United States v. Varig Airlines*, 467 U.S. 797 (1984). Thus, its judgments in individual cases as a practical matter do not have to be as cautious as those Congress requires the airlines to make. Carriers are obligated to, and uniformly do, set higher standards than FAA minimums. The carriers' higher responsibility is more than merely theoretical. Unlike the FAA, the carriers actually have in their hands the responsibility for the lives of their passengers, a practical responsibility that is directly enforceable through enormous monetary liability for mistakes. For this reason, carriers cannot rely solely on FAA certification. For the same reason, the arbitrator's award in this case cannot be justified simply on the basis of the FAA recertification.

4. ALPA does not seriously dispute that the question whether the Federal Aviation Act places limits on the authority of Railway Labor Act arbitrators is an important one that has never been resolved by this Court. Nor does ALPA dispute that *World Airways, Inc. v. International Brotherhood of Teamsters,* 578 F.2d 800 (9th Cir. 1978), conflicts with the decision below. *See also Association of Professional Flight Attendants v. American Airlines, Inc.,* 767 F.2d 1331, 1334 (9th Cir. 1985), reaffirming the validity of *World Airways.* Instead, ALPA tries to distinguish *World Airways* on the grounds that (1) the court there suggested it *might* have upheld a "less intrusive remedy", (2) the court found the pilot's judgmental deficiencies "unremediable," and (3) the arbitrator's "remedy, which so far as appears, did not involve the FAA." Opp. at 14.

ALPA's asserted distinctions are flatly wrong. Like *World Airways,* this case involves the carrier's determination that a pilot lacked "unremediable" judgmental deficiencies. Like *World Airways,* this case involves an arbitrator's highly intrusive "remedy"; indeed, it involves the most intrusive "remedy" imaginable—forcing down a carrier's throat a pilot it considers fundamentally unfit. (The arbitrator in *World Airways,* by contrast, simply ordered the airline to promote the pilot from first officer to captain.) Like *World Airways,* the pilot in this case was certified by the FAA as minimally qualified, but did not meet the carrier's higher standards. (We do not understand ALPA's contention that the remedy in *World Airways* "did not involve the FAA." The pilot must have been certified by the FAA as qualified to be pilot-in-command, or there would have been no issue.)

5. ALPA claims that 49 U.S.C. § 1371(k)(3) is inconsistent with the holding of *World Airways* that the Federal Aviation Act places limits on Railway Labor Act arbitrators. Opp. at 12. Section 1371(k)(3) is a part of the Act's economic provisions and simply preserves economic collective bargaining rights in general. "Rates of compensation" and "working conditions"—the only subjects of Section 1371(k)(3)—do not encompass an airline's safety obligations to the travelling public. That issue falls under Section 1421(b), which is part of the Aviation Act's safety provisions and imposes on carriers a

duty to assure the "highest possible degree of safety." Moreover, the Federal Aviation Act's mandate to air carriers "to maintain the highest possible degree of safety" cannot be read to permit an exception if the carrier's *employees* disagree with the carrier's judgment on how best to fulfill the carrier's statutory obligation. As numerous courts have recognized, safety is the *paramount* goal of the Aviation Act.

6. Nevertheless, ALPA asserts that the Aviation Act cannot be read to impose any restrictions on Railway Labor Act arbitrators because "safety is too important a matter to be entrusted to the airlines." Opp. at 12. Having made this perplexing remark, however, ALPA never explains why safety can be entrusted to private labor arbitrators—who are likely to have no technical expertise and who have no legal or practical responsibility to the travelling public.

ALPA then argues that Northwest would "deprive a pilot discharged for a safety violation—even a serious one—of his right under a collective bargaining agreement and the RLA to have a System Board determine whether there is 'just cause' for his discharge." Opp. at 12. In a similar vein, ALPA claims that if "Northwest could discharge pilots for lack of proper character or judgment without having to objectively justify its assessment before a System Board, then RLA and contractual protections would . . . be illusory." Opp. at 18. ALPA has mischaracterized Northwest's position. We agree that the arbitration mechanism is suitable to decide if there is an "objective" justification for a carrier's determination—that is, to determine the facts. Here it is conceded that Morrison flew while drunk. ALPA does not claim that Northwest relied on whim or caprice, or acted without an objective, safety-related foundation, in dismissing Morrison. Under those circumstances, as the district court found, it is inappropriate for an arbitrator in effect to modify the carrier's safety policies by ordering reinstatement of a pilot who actually violated clear, objective, reasonable, safety-related restrictions.

7. Finally, ALPA relies on this Court's decision in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), for its argument that arbitrators may second-guess air carriers' safety

judgments. Opp. at 13. That case, however, arose under the Age Discrimination in Employment Act of 1967, 28 U.S.C. §§ 621-634, and involved Western's "age 60" retirement rule. The Court held that the retirement rule facially violated the Act's express prohibition against mandatory retirement before age 70. The issue involved was whether the retirement rule fit into a narrowly-defined statutory exception—"where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 472 U.S. at 412. The Court held that an air carrier's safety obligations did not require a jury instruction that the jury *must* defer to the carrier's judgment in deciding whether the carrier met its statutory burden to justify its rule as safety-related. Thus, *Criswell* holds only that, if an air carrier's policy violates an express statutory prohibition, a factfinder may inquire whether the otherwise prohibited policy is "reasonably necessary" in the interest of safety. As this Court emphasized, it was "Congress' decision, in adopting the ADEA, to subject such [facially discriminatory] management decisions to a test of objective justification in a court of law." *Id.* at 419.

Here, by contrast, ALPA does not claim—nor could it—that Northwest's rules prohibiting consumption of alcohol within 24 hours of flight duty or its discharge of Morrison for flying a commercial airliner while intoxicated presumptively *violate* any federal statute that by its express terms would require Northwest to justify its policy. Nor is there any doubt that both the rules and their application to Morrison are objectively safety-related. Indeed, the *only* applicable statutory standard is the command of the Federal Aviation Act that Northwest act to maintain the highest degree of safety. Thus, it would pervert *Criswell* to allow an arbitrator to nullify a carrier's efforts to comply with express Congressional policy.[4]

[4] In addition, the Court's willingness to let a jury consider the carrier's assessment of safety issues rested on its view that the safety concerns in *Criswell* were attenuated, since that case involved an air carrier's policies covering flight engineers—not pilots or co-pilots. The Court emphasized that it is the pilot ("captain") and the co-pilot ("first officer") who are "responsible for all phases" of the flight operation, and the flight engineer " 'does not operate the flight controls unless the captain and the first officer become incapacitated,' " 472 U.S. at 403, *quoting Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 114 (1985).

As the Court stated in *Criswell*:

> "The employer cannot be expected to establish the risk of an airline accident 'to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound.' " *Id.* at 419-420, *quoting Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976).

For the same reason, an arbitrator lacks the authority to force an airline either to ignore a real and substantial threat to safety that has already occurred or to assume a risk for the future.

The petition should be granted and the case set for argument *in tandem* with *Misco*.

Respectfully submitted,

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